JANAGI v. ONG BOON KIAT

[R.C.J. (Sharma J.) April 9, 1971]

[Malacca — Civil Revision No. 2 of 1971]

Practice and Procedure — Pleadings — Disposal of suit involving disputed question of fact — Magistrate disregarding pleadings — Plaintiff not given opportunity to prove case and to cross-examine defendant — Revision — Courts of Judicature Act, 1964, s. 32.

In this case, the plaintiff sued the defendant for repayment of $142.80 interest and costs, on a promissory note executed by the defendant. The plaintiff admitted that she was a licensed moneylender. The defendant denied having borrowed any money from the plaintiff but admitted having taken the loan from a man whose name he was unable to furnish.

The suit came up for hearing before the learned magistrate who purported to have acted under O. 1. r. 2. of the Subordinate Courts Rules. The learned magistrate, without taking any evidence from the plaintiff or her witnesses, began to record a sworn statement from the defendant only in answer to questions put by him. The record showed that no opportunity was given to the plaintiff to cross-examine the defendant. The statement of the defendant he recorded was: "I am 38 years old, residing at 2331, Klebang Kechil — working as a bus conductor. I cannot read, write or converse in English." On that bare statement the learned magistrate made the following order: "I find the defendant could not read, write or converse in English. As such I found that promissory note could not be used as the basis of plaintiff's claim. As such, claim dismissed." This order was made despite the fact that the defendant never raised any plea that the plaintiff had not complied with any of the provisions of the Moneylenders Ordinance. No such issue arose on the pleadings. On revision,

Held: in disposing of a suit or matter involving a disputed question of fact it is not proper for the court to displace the case made by a party in its pleadings and give effect to an entirely new case which the party had not made out in its own pleadings. The trial of a suit should be confined to the pleas on which the parties are at variance. In this case it was not open to the learned magistrate to disregard the pleadings in order to reach a conclusion that he might have thought was just and proper.

Observations on function of pleadings and the duty of courts to follow rules of procedure and practice.

Cases referred to:-

(1) *Blay* v. *Pollard & Morris* [1930] 1 K.B. 628 at p. 634.

(2) *Haji Mohamed Dom* v. *Sakiman* [1956] M.L.J. 45.

REVISION.

Parties in person.

Sharma J. (delivering oral judgment): This is one of the cases where I had called for the records under section 32 of the Courts of Judicature Act, 1964 for purposes of satisfying myself as to the correctness, legality or propriety of the decision of the learned magistrate. The plaintiff sued the defendant for repayment of a sum of $142.80 interest and costs on a promissory note executed by the defendant. The plaintiff in her statement of claim admitted that she was a licensed moneylender. The defence filed by the defendant denied having borrowed any money from the plaintiff but admitted having taken the loan in question from a man whose name he was unable to furnish. The suit came up for hearing before the learned magistrate on the 9th January 1971 who purported to have acted, as he says, under O. 1 r. 2 of the Subordinate Courts Rules and he, without taking any evidence from the plaintiff or her witnesses, started to record a sworn statement from the defendant only in answer to questions put by him. The record shows that no opportunity even was given to the plaintiff to cross-examine the defendant. In the first instance I am at a loss to understand what relevance O. 1 r. 2 of the Subordinate Courts Rules had in this connection. O. 1 r. 2 reads:—

"In any matter of practice or procedure not provided for in these Rules the Court may apply any appropriate provision thereof by construing the same with such modification not affecting the substance as may be necessary or proper to adapt the same to the matter before it.

It is hard to imagine what appropriate provision of the Subordinate Courts Rules the learned magistrate was trying to adapt for the purposes of departing from the established principles and practice of letting the plaintiff prove her case first and how he could deprive the plaintiff of even an opportunity to cross-examine the defendant on what he had stated in answer to what he was asked by the learned magistrate. The statement recorded by the learned magistrate from the defendant in answer to this questioning is "I am 38 years old, residing at 2331, Klebang Kechil — working as a bus conductor. I cannot read, write or converse in English." On that bare statement the learned magistrate made the following order:

"I find the defendant could not read, write or converse in English. As such I found that promissory note (tendered as P.1) could not be used, as the basis of Plaintiff's claim. As such claim dismised."

It should be realised that the defendant never raised any plea that the plaintiff had not complied with any of the provisions of the Moneylenders Ordinance. No such issue arose on the pleadings. A statement of claim and the defence (together with the reply, if any) constitute the pleadings in a civil action. It is on the examination of the pleadings that the court notices the differences which exist between the contentions of the parties to the action. In other words the matters on which the parties are at issue are determinable by an examination of the pleadings. An issue arises when a material proposition of law or fact is affirmed by one party and denied by the other. The court is not entitled to decide a suit on a matter on which no issue has been raised by the parties. It is not the duty of the court to make out a case for one of the parties when the party concerned does not raise or wish to raise the point. In disposing of a suit or matter involving a disputed question of fact it is not proper for the court to displace the case made by a party in its pleadings and give effect to an entirely new case which the party had not made out in its own pleadings. The trial of a suit should be confined to the pleas on which the parties are at variance. If the parties agree to a factual position then it is hardly open to the court to come to a finding different from such agreed facts. The only purpose in requiring pleadings and issues is to ascertain the real difference between the parties and to narrow the area of conflict and to see just where the two sides differ.

It was not open to the learned magistrate to fly off at a tanget as it were and disregard the pleadings

in order to reach a conclusion that he might have thought was just and proper. It was held by Scrutton L.J. in the case of *Blay* v. *Pollard & Morris*:[1]

"Cases must be decided on the issues on record; and if it is desired to raise other issues they must be placed on the record by amendment. In the present case the issue on which the judge decided was raised by himself without amending the pleadings and in my opinion he was not entitled to take such a course."

This case was followed in our own Court of Appeal in *Haji Mohamed Dom* v. *Sakiman*[2] where Sir Charles Mathew C.J. said:

"I think it is clear that a Judge is bound to decide a case on the issues on the record and that if there are other questions they must be placed on the record."

A judgment should be based upon the issues which arise in the suit and if such a judgment does not dispose of the questions as presented by the parties it renders itself liable not only to grave criticism but also to a miscarriage of justice. It becomes worse and is unsustainable if it goes outside the issues. Such a judgment cannot be said to be in accordance with the law and the rules of procedure. It is the duty of the courts to follow the rules of procedure and practice to ensure that justice is done. These rules are meant to be observed and respected. The faith and the confidence of the public in the law, the Constitution and the Government depends to a fairly large extent on the way the machinery of justice functions and it is the duty of those who man that machinery to realise that what they do does not in any way tend to diminish that faith. Everyone is, no doubt, liable to make mistakes but it would have been better if the learned magistrate had acted in less haste and had taken a little time to look up the law on the matter.

The order of the learned magistrate is set aside and the case is sent back to be tried by another magistrate with the direction that he should hear and decide the case on the issues raised in the pleadings. The case will be mentioned before the president of the sessions court on 13th June 1971.

Order of magistrate set aside. New trial ordered.

HAJI HASSAN & ORS. v. TEO SOON YEN & ANOR.

[O.C.J. (Sharma J.) April 24, 1971]

[Malacca — Civil Suits Nos. 8, 9 & 10 of 1962]

Practice and Procedure — Defence — Leave to amend — Application for — Delay — Circumstances contributing — R.S.C. 1957, O. 54 r. 22A.

This was an application for leave to amend the defence of the second defendant. There were 3 suits and the plaintiffs in each suit filed a writ on February 17, 1962 claiming damages from the defendants. The second defendant filed his defence on May 8, 1962 and the first defendant filed his defence on May 30, 1962. In paragraph 9 of his defence, the first defendant claimed to be indemnified by the second defendant against any judgment which the plaintiffs might obtain in these suits. The plaintiffs obtained judgment against both the defendants on March 26, 1971. The proposed amendments introduced for the first time allegations of fraud practised by the first defendant. It also alleged what amounted to commission of an offence by the first defendant. The application originally came up before the judge in chambers on April 3, 1971, and was dismissed. Subsequently, the matter was brought into open court under R.S.C. 1957, 0. 54, r. 22A for further arguments.

Held: in the circumstances of this case, the delay in making the application was due to the fact that the question was not going to arise until after the liability of both the defendants to the plaintiffs' claim for damages was established; and as this particular issue could not have been finally decided until March 26, 1971, the second defendant could not realise earlier that the amendment was necessary. Thus, the delay in the application was not due to the fault of the second defendant alone. The amendment should be allowed subject to the payment of costs.

Case referred to:-

(1) *Riding* v. *Hawkins* (1889) 14 P.D. 56.

CIVIL SUIT.

Dato' Balwant Singh for the applicant/2nd defendant.

W.H. Sault for the respondent/1st defendant.

Sharma J. (delivering oral ruling): This is an application for grant of leave to amend the defence of the second defendant. The application had originally come up before me in chambers on 3rd April 1971 when I dismissed it. The matter is now before me in open court under O. 54 r. 22A of the Rules of the Supreme Court for further arguments. The facts of the case briefly are that the plaintiffs in these three suits filed a writ on 17th February 1962 claiming damages from the defendants. The second defendant filed his defence on 8th day of May 1962 and the first defendant filed his defence on the 30th day of May 1962. In paragraph 9 of the first defendant's defence he claimed to be indemnified by the second defendant against any judgment which the plaintiffs might obtain in these suits. When these three suits came up for hearing it was agreed that the question of the second defendant's liability to indemnify the first defendant should not be gone into until the plaintiffs' claim against the two defendants was heard and finally determined. The plaintiffs obtained judgment against both the defendants on 26th March 1971. It was thus only after that that the question of the liability, if any, of the second defendant to indemnify the first defendant could be considered. The proposed amendments do for the first time introduce allegations of fraud practised by the first defendant. The proposed amendments not only introduce an element of fraud but also allege what amounts to commission of an offence by the first defendant. Various authorities have been cited before me by the learned counsel for the second defendant. It is well established that leave to amend should generally be granted unless the application is not *bona fide* or is such that it is likely to result in some injury to the other side which injury cannot be compensated for by costs. It is also a well recognised principle that the court does not readily allow an amendment the necessity for which should have been abundantly apparent long ago. Further, an amendment is generally not allowed which for the first time introduces a charge of fraud. I need not go into the various authorities which establish those well-